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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *en banc* opinion of the court of appeals (A. 31–47) is reported at 422 F. 2d 332. The original opinion of the panel of the court of appeals (A. 25–27) is not reported. The district court did not render a written opinion.

JURISDICTION

The judgment of the court of appeals (A. 48) was entered on February 2, 1970. On March 16, 1970, Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari to and including April 3, 1970. The petition was filed on April 2, 1970,

and was granted on May 4, 1970 (397 U.S. 1074). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the alleged maturation or crystallization of conscientious objector beliefs after the mailing of a notice to report for induction is, within the intended meaning of 32 C.F.R. 1625.2, a circumstance over which the registrant had no control, permitting his draft classification to be reopened at that late date.

2. Whether in any event there was a "basis in fact" for the local board's refusal to reopen and reclassify petitioner as a conscientious objector.

STATUTE AND REGULATIONS INVOLVED

50 U.S.C. App. 456(j), as in effect at the time this action was commenced, provided in pertinent part:

> Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if

he is inducted into the armed forces under this title * * *, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) * * * such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title * * *, to have knowingly failed or neglected to perform a duty required of him under this title * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. * * *

32 C.F.R. 1625.2 provides:

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the regis-

trant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.

Department of Defense Directive No. 1300.6 (August 21, 1962) provided:

> Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained.

STATEMENT

After trial without a jury in the United States District Court for the Northern District of California,

petitioner was convicted of having refused to submit to induction into the armed forces, and was sentenced to two years' imprisonment. His conviction was reversed by a panel decision of the Court of Appeals for the Ninth Circuit, one judge dissenting. On rehearing *en banc,* however, the conviction was affirmed by an eight-to-five decision.

A. Petitioner first registered with his local board on July 24, 1961, after reaching his eighteenth birthday (F. 1).[1] He made no claim to conscientious objector status in his classification questionnaire (F. 7), which he returned to the board on January 17, 1964 (F. 8). On April 15, 1964, he was sent an order to report on May 26 for his physical examination (F. 13); in response he requested only that the examination be processed through a local board more convenient to his new residence (F. 14).

Petitioner's induction notice was mailed to him June 16, 1965, effective July 14 (A. 50). On July 13, he mailed a letter to his board stating that he could not accept induction and wished to apply for conscientious objector status. He acknowledged that he could no longer make such application as a matter of right but invoked the discretion which he understood local boards possess to reopen classifications. In his letter, petitioner explained that he had been "unable

[1] "A." refers to the printed appendix in this Court; "R." to the trial transcript, which was part of the record in the court of appeals; "F." to petitioner's selective service file, which was part of the record in both the district court and the court of appeals. Both of the latter are part of the record in this Court.

to make a decision of such moment until faced with the absolute necessity to do so" and that, since receiving his induction notice, he had "begun to be more fully aware of the implications of military service at this time." The asserted nature of his objection was, in essence, "that the sole purpose of military service in this country today is preparation for a nuclear orgasm which would be totally destructive of human life and values" (A. 51).

On July 14, petitioner reported to the bus depot from which inductees left for the induction center but refused to go to the center. He was then told to report to the office of his local board. There, he stated that "he was in the process of being a Conscientious Objector" and that he had mailed a letter "a couple days ago" explaining his position. He was given an SSS Form 150 to complete and return and was told that he would hear from the board after his file was reviewed upon receipt of his letter and the completed Form 150 (A. 52).

On his Form 150, petitioner struck out the paragraph addressed to a claim of exemption only from combatant training and service and also the paragraph claiming exemption from both combatant and noncombatant training and service (A. 54). He indicated that he did not believe in a Supreme Being and that he had no convictions which could be called religious in the commonly understood sense of the word (A. 55). Instead, he stated that his claim was based on a belief that "service in the armed forces of this

country at this time is work toward the end of the destruction of the human race" and that his "duty not to work for the destruction of the human race is superior to any duties which may arise from any human relation" (A. 54). He allegedly did believe, however, in the use of force "[u]nder any circumstances in which the use of force would not make more probable the destruction of the human race." As to the time period during which he acquired these beliefs, petitioner stated it was "from September, 1960, to the present"; also, he added, the "source and the method have been the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." Never had he given any written or oral public expression to his beliefs (A. 55).[2]

B. Following petitioner's refusal to submit to induction, his Selective Service file was forwarded to the United States Attorney for prosecution (F. 11, 29, 30). Prosecution was declined on January 5, 1966, in order to enable the local board to review the information submitted by petitioner and afford him another opportunity to submit to induction (F. 34). The state

[2] He also acknowledged that he had participated in R.O.T.C. while he was a student at the University of California, but said that at the time participation was compulsory for lower division male undergraduates (A. 56). At trial, he testified that he knew when he enrolled at the university that he would be required to take R.O.T.C. He added that, except for being annoyed at being forced to take a required course, he had no objection to his participation, since at the time he had "no notion of the ideas which led me to ask for a conscientious objector's status" (R. 26–27).

director instructed the board to consider petitioner's Form 150 and, if it determined not to reopen, to give petitioner another opportunity to report for induction under the previously issued order (A. 58). On January 19, 1966, petitioner was informed that the board had found on review that the facts presented did not warrant a reopening or reclassification (A. 59).[3] He then (January 21) requested a personal appearance before the local board to discuss his application further (A. 60). This request crossed in the mail with a notification sent by the board on January 22 ordering petitioner to report for induction on February 9, 1966, pursuant to the prior induction order (F. 38).

In answer to his January 21 request, the board sent petitioner a letter on January 28 which reviewed the history of his case and then stated that the board had determined, after reconsidering his classification under the provisions of Part 1625 of the Selective Service regulations, that the information submitted on his Form 150 was not indicative of a change in status beyond his control warranting reopening of his classification. Thus, he was told, that under the regulations he was not now entitled to a personal appearance.[4] On February 5, petitioner wrote to the board

[3] An entry was made in the minutes of the local board on January 18, 1966, that petitioner's file had been reviewed and not reopened (F. 11).

[4] The letter explained that a personal appearance is a procedural right to which a registrant is entitled only when a change of classification is made by the local board and the registrant makes a request for such an appearance within ten days after the classification card is mailed (A. 61). See 32 C.F.R. 1625.13.

objecting to the action taken; he requested that the letter be sent to the appropriate appeal board for consideration (F. 40).

On February 9, petitioner appeared before an induction officer but refused to take a new physical examination to determine if he was still physically qualified for induction (F. 42). The same day he signed a statement saying that he refused to be inducted (F. 43).[5]

C. Immediately after refusing to take his physical examination, petitioner was interviewed by an F.B.I. agent. He told the agent that he was refusing induction because he believed that participation in the military would be the same as participation in the destruction of the nation and the world, since he felt that a nuclear war was building. He added that the object of a human being on earth is to perpetuate the race and the country; and, because he viewed war as suicidal, he felt that participation in it would be a contribution to the suicide of the country. He fur-

[5] The next day, the state director requested the local board to forward the file for review (F. 41). Thereafter, on March 2, 1966, the state director wrote to petitioner that examination of his file indicated that his procedural rights had been observed in all respects and hence that no intervention on the state level was contemplated. The letter noted that petitioner had neither claimed conscientious objector status on his classification questionnaire nor appealed his initial 1-A classification but instead had submitted his first claim for the exemption on the day when he was to have reported for induction. The letter also noted that the local board had reviewed his claim when it was submitted and determined not to reopen his file, and had also considered his request for a personal appearance and had explained to him by letter its reasons for denying it (A. 62).

ther informed the agent that his beliefs in this respect were derived solely from reading, studying and talking to other persons (R. 19). Petitioner also said that a contributing factor in his refusal was the fact that the local board had ordered him to report for induction immediately after denying him the appeal which he had requested, since he felt that he should have been entitled to a ten-day period in which to appeal this denial (R. 20).

At trial, petitioner gave a further explanation of the mental process which led to his claim to conscientious objector status. He said that when he entered college in 1960 he came into contact for the first time with pacifist groups who were against the war and the idea of maintaining a nuclear arsenal (R. 24). These groups, he said, engaged in activities and demonstrations designed to show the public that a large number of people "had grave doubts about the validity of the idea of maintaining a strong nuclear arsenal as a necessity of continuing freedom and liberty" (R. 25). He maintained, however, that it was not until he received his first induction notice that he "finally realized" he had "no other choice" but to refuse induction. As he explained it: he "had doubts previously but the induction notice simply forced me to face the issue and I realized the thing about what I was going to do, that I couldn't go in" (R. 28).

SUMMARY OF ARGUMENT

1. This case calls into question the validity of Selective Service regulation 32 C.F.R. 1625.2 insofar

as it has been interpreted to foreclose local boards from entertaining conscientious objector claims raised for the first time after the mailing of a notice to report for induction. At issue is whether such a claim, purportedly based on a sudden late crystallization of inchoate beliefs, can, within the intended meaning of the regulation, constitute a "change in * * * status resulting from circumstances over which the registrant had no control."

That a regulatory prohibition on post-induction-notice claims was deemed essential to the orderly and efficient processing of available manpower into the Armed Forces is not controverted. If registrants had been permitted endlessly to challenge their classifications, it would not only have been disruptive to the System, but also extremely unfair to those eligible registrants whose induction would necessarily have been accelerated to fill the quota vacancies left by late claimants. With this in mind, the single exception in the regulation to the prohibition on post-notice claims is designed to cover only the unusual emergency situation where an unforeseeable event, such as death in the family, may give rise to a belated claim of exemption or deferment.

In our view, this limited exception was not intended to reach post-notice conscientious objector claims. Leaving to theologians, philosophers and psychologists the age-old debate over whether the development of such beliefs are or are not beyond a registrant's "control", we think it clear that the circumstances of crystallization are not the kind of

"circumstances" contemplated by the regulation. The draftsmen intended to permit a last-minute reopening and reclassification based only on the occurrence of some objectively identifiable extraneous event or circumstance which the local board "specifically finds" to be outside the registrant's control, not on some element of a registrant's thought processes.

To construe the regulation as cutting off board consideration of post-notice conscientious objector claims is wholly consistent with the statutory provision exempting from "combatant training and service" those registrants determined by their local boards to be conscientiously opposed to war in any form. 50 U.S.C. App. 456(j). Taken as a whole, this provision was not intended to establish an absolute statutory right of exemption for all those claiming conscientious objector status. Its aim, instead, was to provide a procedural framework for the fair processing of such claims. Within that framework, timeliness has been recognized repeatedly as a valid element of the administrative system, and the regulation merely prescribes what the reasonable time limit must be.

Moreover, this reading of 32 C.F.R. 1625.2 does not deprive one whose beliefs truly crystallize after the mailing of an induction notice but before actual induction of an opportunity to assert his claim. It requires only that he, just as the soldier whose conscientious objection develops subsequent to induction, raise his claim in a different forum and have it considered by the military. If it is sustained, he will, of course, be entitled to immediate discharge.

2. The claim in the instant case was made for the first time well after the mailing of petitioner's induction notice. Thus, if the Court agrees with our interpretation of the regulation, that ends the matter. However, even if it is decided that 32 C.F.R. 1625.2 requires board consideration of post-notice conscientious objector claims, petitioner is not on this record entitled to any relief. The information in his Selective Service file warrants a finding that he was not conscientiously opposed to war in any form and that his beliefs, such as they were, had not in fact crystallized only after the induction notice was mailed. Since the board explicitly acknowledged that it had considered this information in refusing to reopen petitioner's classification, there is sufficient basis for this Court to uphold the denial of Ehlert's post-induction-notice claim.

ARGUMENT

I

A CLAIM TO CONSCIENTIOUS OBJECTOR STATUS IS NOT ENTITLED TO SELECTIVE SERVICE BOARD CONSIDERATION IF MADE AFTER THE MAILING OF AN INDUCTION NOTICE

The regulation here in question—32 C.F.R. 1625.2—provides in pertinent part that a local board is precluded from reopening a registrant's classification once it has mailed him an induction notice unless it "first specifically finds that there has been a change in * * * status resulting from circumstances over which the registrant had no control." It is settled that this prohibition was intended to prevent disrup-

tion of the Selective Service machinery by dilatory assertions of claims of exemption or deferment. *Keene* v. *United States*, 266 F. 2d 378, 384 (C.A. 10); *United States* v. *Beaver*, 309 F. 2d 273, 276 (C.A. 4), certiorari denied, 371 U.S. 951. As the Second Circuit recognized in *United States* v. *Gearey*, 368 F. 2d 144, 149, "[i]f young men eligible for the draft are permitted endlessly to challenge their status and to claim review of adverse determinations, the effect on the Selective Service System would be chaotic, for manpower quotas could rarely be met with any degree of certainty." See *United States* v. *Delfin*, 419 F. 2d 226, 228 (C.A. 2); *Paszel* v. *Laird*, 426 F. 2d 1169, 1173 (C.A. 2). Moreover, such a practice would be unfair to other registrants whose induction is accelerated by their local boards in fulfillment of the duty to fill the quota vacancies left by late claimants. In view of these overriding policy considerations, Selective Service appropriately prohibited virtually all post-induction notice claims, recognizing but a single exception designed to cover the unusual emergency situation where an unforeseeable event, such as death in the

[6] Such acceleration of induction could cause a registrant to be drafted just prior to his twenty-sixth birthday; it could unexpectedly prevent a registrant from enrolling in a college or university, or from seeking employment in a deferred occupation. Also, it could have the effect today of inducting registrants out-of-turn under the present random selection system, possibly subjecting to the draft some whose lottery number, in the normal course of events, would not have been reached. And see the government's brief in *United States* v. *Weller*, No. 77, this Term, p. 44 n. 32.

family, may give rise to a belated claim of deferment (*e.g.*, on grounds of new hardship) or exemption (*e.g.*, as a sole surviving son). See, *e.g.*, *Petrie* v. *United States*, 407 F. 2d 267 (C.A. 9).

The precise issue raised here is whether a post-notice claim, made by a registrant who did not conclude that he was a conscientious objector until after notice was mailed, fits within the intended scope of this exception for emergent circumstances beyond the registrant's control. The Second Circuit has recently held that it does, in *United States* v. *Gearey*, *supra*,[7] but previously the regulation had consistently been construed otherwise. See *United States* v. *Schoebel*, 201 F. 2d 31 (C.A. 7); *United States* v. *Bartelt*, 200 F. 2d 385 (C.A. 7); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (C.A. 3); *Feuer* v. *United States*, 208 F. 2d 719 (C.A. 9); *Leitner* v. *United States*, 222 F. 2d 363 (C.A. 4); *United States* v. *Mohammed*, 288 F. 2d 236 (C.A. 7), certiorari denied, 368 U.S. 820; *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *Porter* v. *United States*, 334 F. 2d 792 (C.A. 7); *Parrott* v. *United States*, 370 F. 2d 388 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908. In-

[7] See also the Second Circuit decisions in *United States* v. *Stafford*, 389 F. 2d 215; *United States* v. *Holmes*, 426 F. 2d 915; *United States* v. *Sandbank*, 403 F. 2d 38, certiorari denied, 394 U.S. 961; *United States* v. *Delfin*, 419 F. 2d 226; *Capobianco* v. *Laird*, 424 F. 2d 1304, petition for certiorari pending, No. 611, this Term; *Paszel* v. *Laird*, 426 F. 2d 1169.

deed, since *Gearey* only the Third Circuit has agreed that the exception should be so applied;[8] all other courts of appeals that have since passed directly on the question have refused to follow the *Gearey* rationale, holding instead that 32 C.F.R. 1625.2 forecloses consideration by the local board of any conscientious objector claim made after the mailing of an order to report for induction. *United States* v. *Al-Majied Muhammad,* 364 F. 2d 223, 224 (C.A. 4); *United States* v. *Helm,* 386 F. 2d 434, 435 (C.A. 4), certiorari denied, 390 U.S. 958; *Davis* v. *United States,* 374 F. 2d 1, 4 (C.A. 5); *United States* v. *Jennison,* 402 F. 2d 51, 52–53 (C.A. 6); *Dugdale* v. *United States,* 389 F. 2d 482 (C.A. 9); and see *United States* v. *Kroll,* 400 F. 2d 923 (C.A. 3).

This Court is now asked to overturn the weight of judicial and administrative precedent which sustains a specific cut-off date for submission of pre-induction conscientious objector claims, by either adopting the Second Circuit's interpretation of 32 C.F.R. 1625.2, as first enunciated in *Gearey,* or declaring the regulation,

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[8] *Scott* v. *Volatile*, No. 18,546, decided September 15, 1970. But see *United States* v. *Kroll*, 400 F. 2d 923 (C.A. 3). In both the First and the Tenth Circuits, while the question has yet to be reached, there is dictum in related cases suggesting that these Circuits might well follow *Gearey*. See *United States* v. *Stoppelman*, 406 F. 2d 127, 131, n. 7 (C.A. 1), certiorari denied, 395 U.S. 981; *Martinez* v. *United States*, 384 F. 2d 50–51 (C.A. 10); *United States* v. *Maine*, 417 F. 2d 951, 953 (C.A. 10). And see *United States* v. *Hinch*, 292 F. Supp. 696 (W.D. Mo.); *United States* v. *Blaisdell*, 294 F. Supp. 1303 (D. Me.). See also *United States* v. *Brown*, 129 F. Supp. 237 (D. N.J.).

as traditionally interpreted, inconsistent with 50 U.S.C. 456(j). Neither approach, we urge, withstands close scrutiny.

A. THE MANIFEST PURPOSE OF THE REGULATION WAS TO SET AN ABSOLUTE TIME LIMIT ON CLAIMS NOT BASED ON EMERGENT EXTERNAL EVENTS

The *Gearey* case involved a post-induction-notice claim to conscientious objector status based on the registrant's assertion that his objection to war in any form "did not ripen until after he received his notice." 368 F. 2d at 149. The local board there granted the registrant a personal interview to articulate his newly formed beliefs and then concluded that "he did not qualify to be a genuine c.o." and "[a]ll facts considered [he] did not warrant a change in classification." 368 F. 2d at 147, n. 4. Gearey then refused to submit to induction, and he was convicted under 50 U.S.C. App. 462(a). On appeal, the conviction was vacated and the case remanded to determine whether the local board's action was based on a finding that the claim was in fact not genuine or, instead, was based solely on the ground that the claim was not made prior to the mailing of the induction notice. The Second Circuit stated (368 F. 2d 150):

> If the Board finds * * * that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred "resulting from circumstances over which the registrant had no control," and he would be entitled to be reclassified by the Local Board.

It is this interpretation of 32 C.F.R. 1625.2 which was rejected below and is again urged by petitioner here. The issue turns not on the words "change * * * in status"; rather, the lines are drawn over whether a post-notice crystallization of inchoate beliefs can result from "circumstances over which the registrant had no control" within the intended meaning of the regulation.

Petitioner and *amicus* argue forcefully that because conscientious objection is by definition a "matter of conscience", both the crystallization of beliefs and the point in time at which that occurs are *ipso facto* "circumstances over which the registrant had no control" (Br. 9, 11; Am. 6–7).[9] Reference is made to the experience of Saul of Tarsus (Br. 12), though more demonstrative of a complete religious conversion than of a crystallization of inchoate beliefs, as a typical analogue.

While we might also join the age-old debate among theologians, philosophers and psychologists (see *Paszel* v. *Laird, supra,* 426 F. 2d at 1172) as to whether or not a decision of this kind is, as an abstract matter, "involuntary" on one or another definition of that term,[10] we fail to see how such discussion in abstract

[9] "Br." references are to the Brief for petitioner; "Am." references are to the Brief of Lawyers' Selective Service Panel of San Francisco, as *Amicus Curiae.*

[10] In *Scott* v. *Volatile, supra,* slip op. 11–18 (Aldisert, J. concurring), the differing viewpoints are summarized. Thus, John Dewey and Bertrand Russell both emphasize the use of the deliberative process, while David Hume and H. H. Price

intellectual or mystical terms is pertinent to the interpretation of a Selective Service regulation. The question here is the much simpler, more concrete question of what the regulation intends by its use of the terms. The kind of exercise petitioner invites us (and the Court) to join is, in our view, a singularly inappropriate basis for any governmental decision, whether executive or judicial, and we cannot share the assumption that the regulation in question contemplates it. Our argument as to the impact of the regulation is, therefore, simply that the development of conscientious objection, whether or not some would regard it as beyond the registrant's "control," is not the kind of "circumstance" that was contemplated. See 422 F. 2d at 335 (Duniway, J. concurring).

As we have indicated, the prohibition on post-notice claims established by 32 C.F.R. 1625.2 is plainly designed as a protection against the assertion of "last minute changes in status for purposes of avoidance." *United States* v. *Beaver, supra,* 309 F.2d at 276. Before the local board is permitted to reopen after mail-

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argue forcefully on the other side. *Id.* at 14–16. In the middle, taking a position that beliefs are at times within one's control and at other times due to emotion, are William James and C. J. Adcock. See James, *Psychology* (Briefer Course, Collier Books, 1969 ed.), 392, 426; Adcock, *Fundamentals of Psychology* (Penguin Books, 1968), 212–213. And see Freud, *The Ego and the Id* (Norton, 1962 ed.), 15, where the following point is made: "The ego represents what may be called reason and common sense, in contrast to the id, which contains the passions."

ing an induction notice, it must not only be satisfied that a change in status has occurred but also must specifically find that the "circumstances" causing such change actually did exist and were in fact beyond the registrant's control. Unlike the pre-induction notice claim (see *Mulloy* v. *United States,* 398 U.S. 410, 415–416), it is not enough that the registrant is able to make out a *prima facie* case at the eleventh hour (see *Paszel* v. *Laird, supra* (426 F. 2d at 1172–1174);[11] he must present affirmative evidence that some event or circumstance discernably outside his control did in fact occur which in and of itself suddenly entitled him to an exemption or deferment classification—*i.e.,* a sudden death in the family (*supra,* pp. 14–15). Cf. *Petrie* v. *United States,* 407 F. 2d 267 (C.A. 9); *Badger* v. *United States,* 322 F. 2d 902, 906 (C.A. 9).

This standard, if held applicable and then applied in its terms to late conscientious objector claims, would require a registrant to demonstrate to his local board both (1) that his crystallized beliefs are now for the first time "truly held" (*United States* v. *Seeger,* 380 U.S. 163, 185) and (2) that uncontrolled circumstances in fact occurred which directly caused the crystallization. See *Scott* v. *Volatile, supra,* slip op. 5–6. Thus, before reopening the board would be compelled by the regulation to engage in precisely the kind of inquiry appropriate only for debate by theologians, philosophers, and psychologists. We cannot believe the

[11] See also our Petition for a Writ of Certiorari in *Laird* v. *Capobianco,* No. 611, this Term, pp. 7–9.

regulation intended such a result.[12] Cf. *United States* v. *Jennison, supra,* 402 F. 2d at 53; *United States* v. *Schoebal, supra,* 201 F. 2d at 32. Clearly, it is not appropriate for a local draft board to examine the mental processes by which a registrant claims he arrived at his beliefs. *United States* v. *Seeger, supra,* 380 U.S. at 184–185. One hardly can expect a board to cope effectively with the perennial controversy over whether "matters of conscience" are within or without a person's control. As this Court has indicated, while "[s]ome theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts * * * these are inquiries foreclosed to Government." *United States* v. *Seeger, supra,* 380 U.S. at 184.

Indeed, the *Gearey* decision implicitly recognizes as much, but argues instead for an irrebuttable presumption in favor of late conscientious objector claimants—*i.e.,* if they can show a change in status, such "change" wa *sipso facto* due to circumstances beyond their control within the meaning of the regulation (368 F. 2d at 150). But any such rule is contrary to the clear intent of the regulatory language, for it reads out of the proviso the most essential element of proof necessary for the extraordinary relief of last-minute reclassification. It thus requires for certain claimants a post-notice reopening on precisely the type of showing (change in

[12] Judge Duniway, concurring below, observed: "[t]he word 'circumstances' indicates to me some fact, act or event external to the mind or consciousness of the registrant, rather than the mysterious and unfathomable internal mental and spiritual processes of the registrant himself." 422 F. 2d at 335.

status, and nothing more) which the drafters of the regulation manifestly demed to be inadequate.[13] Moreover, it assumes the very theological-philosophical-psychological point which remains in controversy; whether matters of conscience are actually voluntary

[13] In *United States* v. *Stafford*, 389 F. 2d 215, the Second Circuit, applying the *Gearey* rationale, read the regulation as requiring a postponement of induction for purposes of according the board an opportunity to review a C.O. claim based on late crystallization where the written claim is raised for the first time *at the induction station*. And in *United States* v. *Holmes*. 426 F. 2d 915 (C.A. 2), the same result was reached where the claim was made *orally* for the first time at the induction center (which was also the situation in the instant case). Both decisions rested on the Second Circuit's conclusion that it is reasonable to consider the induction station as merely an arm or agent of the Selective Service administrative agency and thus as an instrumentality of the local board for purposes of receiving a belated conscientious objector claim. Thus *Gearey*, as extended by *Stafford* and *Holmes*, stands for the proposition that a postponement of induction is automatic on the mere assertion at the induction station of a post-notice claim, notwithstanding the fact that no written request to reopen and reclassify is made to the local board pursuant to 32 C.F.R. 1623.1(b) and 1625.2. Such an interpretation of 32 C.F.R. 1625.2 totally disregards the very nature and purpose of the questioned proviso—*i.e.*, the prevention of substantial disruption to the Selective Service machinery by dilatory assertions of claims of exemption or deferment. These considerations apply with particular force to relieve the Selective Service System from the necessity of affording a lengthy delay in induction. *Blades* v. *United States*, 407 F. 2d 1397, 1399–1400 (C.A. 9). As the court below correctly observed in *Palmer* v. *United States*, 401 F. 2d 226, 227–228, "[c]lassification functions of the local board cease with induction, and a registrant cannot, by refusing to submit to induction, impose upon the board any new duties respecting reclassification or reopening." See *Martinez* v. *United States*, 384 F. 2d 50, 51 (C.A. 10); *United States* v. *Stoppelman*, 406 F. 2d 127, 131–132 (C.A. 1); *Straight* v. *United States*, 413 F. 2d 263, 264 (C.A. 9).

or involuntary is a question no more appropriate for the courts to answer than for the local boards. Cf. *United States* v. *Seeger, supra,* 380 U.S. at 185; *Welsh* v. *United States,* 398 U.S. 333, 339. And even if it were permissible for the courts to pass judgment upon such a matter, there is nothing in the reasoning of *Gearey* or in the arguments in the instant case that justifies the conclusion that *every* late-blooming conscientious objection is the product of forces beyond the registrant's "control", the conclusion that necessarily underlies the reading of the regulation that *Gearey* and petitioner here suggest.[14]

Accordingly, the provision of the regulation allowing limited emergency reopenings by local boards cannot reasonably be read as intended to cover late conscientious objector claims.[15] Clearly what the drafts-

[14] See pp. 26–27, n. 19, *infra.* Moreover, since an alleged "crystallization" or "maturation" of conscientious objector beliefs necessarily contemplates the existence of inchoate antiwar sentiments, which in varying degrees are harbored by registrants prior to the date they ripen, the *Gearey* presumption would make it virtually impossible to distinguish the true late crystallizer from the conscientious objector who was always sincerely opposed to war in any form but simply delayed in asserting his claim until after the mailing of an induction notice. See *infra*, p. 31.

[15] We point out that our reading of the regulation does no more than push forward the final date for assertion of such claims before the board from the date of induction to the date of mailing a notice of induction. Thus, in the vast majority of crystallization cases, registrants who, as petitioner, had been "unable to make a decision of such moment until faced with the absolute necessity to do so" (Br. 1), will find themselves faced with such an "absolute necessity" at the time of the I–A classification, rather than at the time they are to take the symbolic step forward at the induction center. *Supra*, n. 13.

men of the regulations contemplated by the questioned language, as we have already pointed out, was simply the occurrence of some objectively identifiable extraneous event or circumstance which the local board could specifically find to be outside the registrant's control, and not some element of a registrant's internal thought processes.

The argument is made that to adhere to such a narrow interpretation has the effect of singling out conscientious objectors as the only claimants seeking exemption or deferment status who are unable to obtain board reclassification after the mailing of an induction notice. We point out initially that, even if this were the case, it would not suggest a basis for invalidating the regulation. It is well settled that "no one has a constitutional right to exemption from military service." *United States* v. *Beaver, supra,* 309 F. 2d at 276; cf. *Warren* v. *United States,* 177 F. 2d 596, 598–600 (C.A. 10), certiorari denied, 338 U.S. 947. Perhaps equally relevant is the fact that conscientious objectors are indeed not alone in this respect. Also foreclosed from further consideration after the designated cut-off date are claims of a change to student (II–S) deferment status or occupational (II–A) deferment status, for example. Cf. *Scott* v. *Volatile, supra,* slip op. 2. It is quite clear, then, that the exception to the proviso is not directed, either favorably or unfavorably, at any specific class of claimants; it is drafted so as to meet exceptional emergency situations if and when they arise.

It is contended, however, that a rejection of the *Gearey* rationale by this Court would forever preclude a

conscientious objector whose beliefs crystallize late from asserting his claim (Br. 21). But this is not true. While it is true that the claim can no longer properly be raised before the local board, it can be considered by the military immediately upon induction; the suggestion that the military would offer no relief for any conscientious objection developed between a registrant's notification and his induction is, as Judge Ely (concurring below) observed, "more fancied than real" (422 F. 2d at 337, n. 3). Department of Defense directive No. 1300.6 (August 21, 1962), only part of which has been relied on by petitioner (Br. 22), plainly deals with post-induction claims which could have been raised "prior to *notice of* induction" but were not [16] (emphasis supplied). At the time this action was commenced, the Directive stated explicitly that "failure to make *timely* claim for exemption constitutes *waiver* of the right to claim" (emphasis supplied), and then, continuing with the word "Therefore," [17] went on to declare that a con-

[16] There is, then, no substance to the "hiatus" problem which disturbs petitioner (Br. 21–24) and the dissenting judges below. See 422 F. 2d at 339. All conscientious objectors whose claims are sustained by the local board prior to the mailing of an induction notice are on the same footing under Section 6(j) (see *infra*, pp. 30–31). Those whose beliefs allegedly crystallize subsequent to such mailing date will be processed by the armed forces under the applicable military procedures (*infra*, n. 18).

[17] Recently the directive has been restructured so as to begin with what formerly was the second sentence, followed by this language: "*This accords with* Federal court holdings that a claim to exemption from military service under the Selective Service laws must be interposed prior to *notice* of induction and failure to make *timely* claim for exemption constitutes waiver of the right to claim." Department of Defense Directive No. 1300.6 (May 10, 1968) (emphasis supplied).

scientious objector claim "which existed but was not claimed [*i.e.*, had been waived] prior to induction * * * cannot be entertained." Thus, when the language quoted by petitioner is properly read in connection with the unequivocal policy statement directly preceding it, it follows that "the thrust of the directive is toward claims arising before the induction notice" (422 F. 2d at 337, n. 3). It was not designed to exclude claims which a registrant had not waived but rather, due to late crystallization, had never had an opportunity to assert prior to induction.[18] Nor to our knowledge has the Directive ever been so applied.[19]

[18] As to such claims, the various military services have prescribed specific procedures for investigating and processing such claims and, where appropriate for granting discharges. Department of Defense Directive No. 1300.6 (May 10, 1968) expressly declares that, "[s]ince it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service standards used in determining I–O or I–A–O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service." And see Army Regulation AR 635–20 (January 1, 1970); Navy Department BUPERINST 1900–5 (July 18, 1968); Marine Corps Order MCO 1306.16B (June 18, 1969). Air Force Regulation AFR 35–24 (March 25, 1969); Coast Guard COMDTINST 1900.2 (October 7, 1968).

[19] Even if we could accept the abstract general approach to the problem of late-blooming conscientious objection that petitioner advocates, we do not believe that, on the facts as petitioner has presented them in this litigation, he could claim that his alleged crystallization of beliefs was an occurrence in any meaningful sense beyond his control. Petitioner claims that he has harbored vague antiwar sentiments before his induction notice came, and that they did not ripen into a "conscientious objection" until several weeks after that date. In his words, he had been "unable to make a *decision of such moment* until faced with the absolute necessity to do so" (Br. 1; emphasis sup-

B. THIS LIMITATION ON POST-NOTICE CLAIMS IS AUTHORIZED BY STATUTE AND DOES NOT CONFLICT WITH SECTION 6(j) OF THE ACT

Petitioner contends that the questioned proviso of the regulation, if interpreted as foreclosing further board consideration of conscientious objector claims after the mailing of an induction notice, is neither authorized by statute nor consistent with 50 U.S.C. App. 456(j) and therefore must be declared invalid. We cannot agree.

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plied). In these circumstances, we think it clear that the ultimate decision to claim conscientious objector status is a matter of rational thought well within the registrant's control. Perhaps the triggering event which prompts such a momentous decision may be a circumstance over which the registrant had no control (though we cannot view the receipt of an induction notice containing information already known to the registrant as so dramatic and unexpected that it falls within this category), but the decision itself seems in any event to be a rational one. Moreover, even if the time when a registrant finally *makes* that decision once he has put his mind to it were a circumstance over which he has no control, it is not altogether clear that he cannot control the time when he chooses directly to confront the problem and *start* the thinking process. As the court below observed in another case "[a]n average man of average intelligence, who can read, must daily realize that he may, once he is subject to a draft call from his board due to his designated classification, be 'soon' called upon to kill." *Parrott* v. *United States*, *supra*, 370 F. 2d at 396. Is it, then, unreasonable to require that he sit down at the outset and think through his inchoate objections to war, rather than encourage him to postpone the decision to the eleventh hour? We think not.

Thus, petitioner's particular claim can be rejected without becoming too deeply embroiled in theological-philosophical-psychological disputation. In contrast, acceptance of his claim would, as we have shown, either require that local boards decide other, closer cases on the basis of such disputations or else unjustifiably emasculate the basic regulation by establishing an irrebuttable presumption that all crystallizations of conscientious objection are uncontrollable circumstances (see n. 14 *supra*).

The Universal Military Training and Service Act, like the present law,[20] contained a provision authorizing the President to prescribe the rules and regulations necessary for its administration. 50 U.S.C. App. 460(b)(1). Under this grant of power, President Eisenhower signed Executive Order No. 10594 on January 31, 1955, setting forth in its entirety the present language of 32 C.F.R. 1625.2.[21] The complete regulation, including the prohibition on reopening questioned here, was manifestly intended to have application to all claims of exemption or deferment, and so must be considered in this broad context—not simply in the narrow context of conscientious objection—in ascertaining its statutory authorization. So viewed, the establishment (in the vast majority of cases) of an absolute cut-off for further requests to reopen and reclassify at the point of the final act by the local draft board in processing a registrant for induction (*i.e.*, the mailing of a notice to report) is not

[20] Petitioner was convicted under the Universal Military Training and Service Act rather than under the present Military Selective Service Act of 1967. There are two variations, not directly pertinent here, between the version of the exemption section (50 U.S.C. App. 456(j)) appearing in the present statute and the version which appeared in the statute under which petitioner was convicted: the earlier form of the section contained a definition of "religious training and belief" and also provided certain rights of administrative appeal for registrants to whom local boards denied classification as conscientious objectors. Both provisions were omitted from the 1967 statute; provision for appeal is now found only in the Selective Service regulations (see 32 C.F.R. 1626, 1627).

[21] In 1942, two years after the Selective Service Training Act became law, the President promulgated former 32 C.F.R. 626.2 which is substantially similar to what is today 32 C.F.R. 1625.2.

"unreasonable or de rogatory to the spirit and pur-
pose" (*Keene* v. *Unit ed States,* 266 F. 2d 378, 383 (C.A.
10)) of the Act. On th e contrary, the courts have consist-
ently recognized that "[w]ithout such a regulation, the
manpower quotas of Selective Service could not be met
with any degree of certainty." 422 F. 2d at 334;
United States v. *Delf in, supra,* 419 F. 2d at 228; *Paszel* v.
Laird, supra, 426 F. 2d at 1173. As earlier indicated,
not only is it es sential to the achievement of
what is indisputably the single most important objec-
tive of the System—the orderly and efficient process-
ing of available man power into the Armed Forces (cf.
United States v. *N ugent,* 346 U.S. 1, 9; *Falbo* v.
United States, 320 U.S. 549, 553; see also *Estep* v.
United States, 327 U.S. 114, 140 (Frankfurter, J.,
concurring))—it al so substantially reduces injustices
resulting from an o therwise unnecessary order of in-
duction of another e ligible registrant to meet quota re-
quirements (*supra,* p. 14, n. 6). As observed even in
Gearey (368 F. 2d a t 149), "[y]ears of experience have
demonstrated that it is necessary and reasonable to set
limits on the time in which a claim must be as-
serted. * * *." [22]

[22] In *Kramer* v. *Uni ted States,* VDG F. 2d 756, 759 (C.A. 6),
it was said, "The Supr eme Court has declared that legislation
must be often adapte d to conditions involving details with
which it is impractica ble for the legislature to deal directly;
and that the Constituti on does not deny to Congress 'the neces-
sary resources of flexi bility and practicality, which will enable
it to perform its func tion in laying down policies and estab-
lishing standards, whi le leaving to selected instrumentalities
the making of subord inate rules within prescribed limits and
the determination of f acts to which the policy as declared by
the Legislature is to a pply.' *Currin* v. *Wallace,* 306 U.S. 1, 15;
Panama Refining Co. v. *Ryan,* 293 U.S. 388, 421. * * *"

Even so, petitioner argues that, to the extent the regulation has application to conscientious objector claims and is construed as it was below, it is contrary to the statutory mandate of 50 U.S.C. App. 456(j), which provides in part that "[n]othing" shall require conscientious objectors "to be subject to combatant training and service in the armed forces." The quoted statutory language, however, cannot be read in isolation. Section 6(j) as a whole makes clear that Congress did not intend to establish an absolute statutory right of exemption for all those claiming conscientious objector status. See *Clark* v. *United States,* 236 F. 2d 13, 21 (C.A. 9). Its aim, instead, was to provide a procedural framework (*United States* v. *Gearey, supra,* 368 F. 2d at 150; *Keene* v. *United States, supra,* 266 F. 2d at 383–384) for the fair processing of conscientious objector claims alleged to come within the statutory definition. Cf. *United States* v. *Seeger, supra; Welsh* v. *United States, supra.* Thus, the first sentence of the section, on which petitioner and *amicus* rely so heavily, has effect, in light of the third sentence of Section 456(j), only where such a claim *"is sustained by the local board"* (emphasis supplied). If a claimed exemption is denied by the board and on appeal within the Selective Service System, a registrant is subject to "combatant training and service" under the statute if the denial, even though perhaps erroneous (*Estep* v. *United States,* 327 U.S. 114, 122–123), has a "basis in fact." *Witmer* v. *United States,* 348 U.S. 375, 377; *Dickinson* v. *United States,* 346 U.S. 389; *Mulloy* v. *United States, supra,* 398 U.S. at 416. Accordingly, the statutory scheme does not establish a judicially enforceable right to

exemption, but more simply a system for fair administrative consideration of exemption claims.

To construe the word "nothing" in the manner urged by petitioner would not only have the effect of rendering all but the first two sentences of Section 6(j) meaningless; it would also require local boards to recognize conscientious objector claims whenever made, including those that could have been asserted prior to the mailing of an induction notice but were not communicated to the board until after that date. That argument has been uniformly rejected by the various courts of appeals *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2); *Davis* v. *United States*, 374 F. 2d 1 (C.A. 5); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *United States* v. *Beaver*, 309 F. 2d 273 (C.A. 4), certiorari denied, 371 U.S. 951; *United States* v. *Kanner*, 416 F. 2d 522 (C.A. 9); *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Schoebel*, 201 F. 2d 31 (C.A. 7). Quite clearly, then, timeliness is a valid element of the administrative system; the purpose of the statute goes no further than to assure that the Selective Service process will exempt from "combatant training and service" [23] those whose timely claims to conscien-

[23] We emphasize further that the provision makes explicit reference to "combatant training and service." Plainly, "[c]onscientious objector status does not *per se* excuse the registrant from *induction*." *United States* v. *Beaver*, *supra*, 309 F. 2d at 276 (emphasis supplied). Indeed, Section 6(j) provides expressly that even where a claim "is sustained by the local board," a conscientious objector may be "*inducted* into the armed forces under this title" and "assigned to noncombatant service" (emphasis supplied).

tious objector status are (within the limited constraints of judicial review) sustained by the local board or the appeal board.[24] Cf. *Cark* v. *United States, supra,* 236 F. 2d at 21. The regulatory proviso of 32 C.F.R. 1625.2, establishing the mailing of an induction notice as the final cut-off date for submitting such claims to local boards, is entirely consistent with this scheme. *United States* v. *Kroll,* 400 F 2d 923 (C.A. 3). As stated by the Sixth Circuit in *United States* v. *Taylor,* 351 F. 2d 228, 230:

> It seems reasonable to this court (and in accord with the great weight of authority) for regulations of the selective service system to provide that a claim of conscientious objector

[24] The argument by *amicus* (Am. pp. 17–19) that the statute thus "creates two classes [of registrants]" in violation of equal protection of the laws is without substance. As we have demonstrated, it is not "unreasonable or derogatory to the spirit and purpose of the exempting statute to provide by regulation that no request for reopening and reclassification shall be entertained after notice to report for induction is mailed." *Keene* v. *United States,* 266 F. 2d 78, 383–384. Such a cut-off date does not deny sincere conscientious objectors whose beliefs crystallize late an opportunity to claim exemption from "combatant training and service in the armed forces." It merely requires, for valid policy reasons (*supra,* pp. 28–29), that they assert their claim after induction and have it processed pursuant to the applicable military regulations, rather than pursuant to the Selective Service regulations. "There is here no interference with defendant's right to adopt and believe the religion of his choice. To the extent that his freedom of desired action in the practice of his religious faith is curtailed, that curtailment is a permissible result of the selective service laws adopted and enforced for the protection of the nation." *United States* v. *Mohammed,* 288 F. 2d 236, 244 (C.A. 7), certiorari denied, 368 U.S. 820. See *Warren* v. *United States, supra,* 177 F. 2d at 598–600.

status must be made before the individual concerned has been notified to report for induction.[25]

II

EVEN ASSUMING POST-NOTICE CLAIMS OF CONSCIENTIOUS OBJECTION ARE ENTITLED TO BOARD CONSIDERATION, THE REFUSAL TO REOPEN WAS WARRANTED IN THE PRESENT CASE

Though the local board stated no reasons for its refusal to reopen after consideration of petitioner's conscientious objector claim,[26] it did indicate in a subsequent letter (*supra*, p. 8) that the basis for its action was its inability to find, on reviewing the entire file (including information submitted in the SSS Form 150) "under the provisions of Part 1625" of the regulations, "a change in [petitioner's] status which was beyond [his] control" (A. 61). We submit that even if the Court were to adopt the *Gearey rule*, a reopening would not be required on the facts of this case.

1. *Amicus* suggests that reopening is required if a court finds that petitioner made a *prima facie* showing

[25] Due process does not require that the cut-off date selected be contingent upon something within the control of the registrant; so long as it has a reasonable relation to the overriding purpose of the statute (see *supra*, pp. 28–29), it will not be considered unconstitutionally "arbitrary and capricious" (Am. 19). See *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (Holmes, J., dissenting).

[26] Here the local board entertained the claim subsequent to petitioner's first refusal to submit to induction only after the United States Attorney declined prosecution so as to afford the board an opportunity to review the information submitted, and the state Selective Service director instructed the board to consider petitioner's Form 150. See *supra*, pp. 7–8.

of conscientious objector status (Am. 10–13). However, the regulation governing reopening expressly provides that the board is permitted to reopen in the post-notice situation only if it "first specifically finds" a change resulting from circumstances beyond the registrant's control. 32 C.F.R. 1625.2. Thus, the *prima facie* showing that would be sufficient to warrant a pre-notice re-opening (*Mulloy* v. *United States,* 398 U.S. 410)—where the board has unrestricted power under the regulation if new facts are presented [27]—will not suffice when the claim is submitted after a notice of induction has been mailed. *Paszel* v. *Laird, supra; Scott* v. *Volatile, supra; United States* v. *Bowen,* 421 F. 2d 193, 197 (C.A. 4). See our Petition for a Writ of Certiorari in *Laird* v. *Capobianco,* No. 611, this Term, pp. 7–9.

It follows that a board determination to refuse a post-notice reopening, resting as it does on determinations of fact, is subject to judicial review only to the same extent as an original classification by the board.[28] *United States* v. *Gearey,* 379 F. 2d 915 (C.A. 2), certiorari denied, 389 U.S. 959; *United States* v. *Moham-*

[27] 32 C.F.R. 1625.4 states only that a board shall not reopen in any event where no new facts are presented, or where new facts are presented which "*if true*, would not justify a change"—*i.e.*, where no *prima facie* showing has been made (emphasis supplied).

[28] The traditional rule, first laid down by this Court (*Estep* v. *United States*, 327 U.S. 114, 122–123; *Dickinson* v. *United States*, 346 U.S. 389, 394; *Witmer* v. *United States*, 348 U.S. 375, 380–381), and now codified by statute (50 U.S.C. App. (Supp. V) 460 (b)(3)), has been that the classification assigned by the local board is valid and not subject to review if it has a "basis in fact" discoverable from the record.

med, supra, 288 F. 2d 236, 238. In both instances, the action taken must be upheld if it has a "basis in fact" discoverable from the record. *Estep* v. *United States,* 327 U.S. 114, 122–123; *Witmer* v. *United States,* 348 U.S. 375, 380–381. "[I]t is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." *Witmer* v. *United States, supra,* 348 U.S. at 380–381; *Dickinson* v. *United States,* 346 U.S. 389, 394.

In the instant case there is ample evidence to support the Board's refusal to reopen (assuming *arguendo* that such reopening is allowed). Even under *Gearey,* the registrant is not entitled to reclassification unless the "Board finds * * * that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector" (368 F. 2d at 150). Since exempt status is a matter of legislative grace (*Keene* v. *United States, supra,* 266 F. 2d at 383), it is the registrant who "bears the burden of clearly establishing a right to the exemption." *Dickinson* v. *United States, supra,* 346 U.S. at 395. Here, as Judge Ely (concurring below) emphasized, Ehlert failed to supply "the barest basis, even vestigial," upon which his board could have made even the minimal *Gearey* findings. 422 F. 2d at 336.

2. With respect to the timing of his alleged "change in status", Ehlert represented in his Form 150 responses (A. 54–57) that he had "received the training and acquired the belief which [was] the

basis of [his] claim" during "[t]he time period * * * from September 1960, to the present" (*i.e.*, July 1965). He identified the "source and method" of his training as "the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." His claim was late, he stated, due to an inability "to make a decision of such moment until faced with the absolute necessity to do so"; and added: "Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time." (A. 51).

From this information, the board could well have concluded that "Ehlert had long been aware of his beliefs but had simply been unable to decide whether to claim the status to which he felt entitled."[29] 422 F. 2d at 336 (Ely, J., concurring). And as District Judge Zirpoli observed, support for this interpretation can be found in the five-year period it allegedly took the "natural workings of [his] eager-to-know and questioning mind" to develop his objection, coupled with the fact that Ehlert did not assert his claim until faced with boarding the bus to the induction center, almost a full month following receipt of the notice to report. 422 F. 2d at 336. The board's action is, then, clearly sustainable in that there is, at the very least, a "basis in fact" for finding on this record that Ehlert did not experience a crystal-

[29] District Judge Zirpoli indicated at trial that he was then inclined to place just such a construction on these statements. See 422 F. 2d 336.

lization of inchoate beliefs only after receipt of the notice.

3. Indeed, there is every reason to conclude that, even assuming a late maturation, the beliefs petitioner held at the time of his claim did not qualify him as a conscientious objector. Thus, he expressed the view that "service in the armed forces of this country *at this time* is work toward the end of the destruction of the human race." (A. 54; emphasis supplied). His "duty", he said (A. 54), "not to work for the destruction of the human race is superior to any duties which may arise from any human relation." Accordingly, he "believe[d] in the use of force * * * [*u*]*nder any circumstances* in which the use of force would not make *more probable* the destruction of the human race" (A. 55). As he assessed the present situation, however, "the sole purpose of military service in this country *today* is preparation for a nuclear orgasm which would be totally destructive of human life and values" (A. 51).[30]

These statements could reasonably be read as reflecting an "objection to war [which] does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy" (*Welsh* v. *United States, supra,* 398 U.S. at 342–343) *i.e.,* petitioners' views are "essentially political, sociological or philosophical" or emanate from a "merely personal code." 50 U.S.C. App. 456(j). His objection was

[30] In the same letter, he also stated: "[s]ince the receipt of my induction notice, I have begun to be more fully aware of the implications of military service *at this time*" (emphasis supplied).

not to "participation in war in any form" as required by Section 6(j), but, at best, constituted a "selective" objection, which is no basis for exemption unless this Court holds to the contrary in *Gillette* v. *United States,* No. 85, this Term, or *Negre* v. *Larsen,* No. 325, this Term. Thus, contrary to the assumption of *Amicus* (Am. 12), petitioner's selective service file can be read as failing to present even a *prima facie* claim to conscientious objector status.[31]

4. Accordingly, irrespective of its decision on the timeliness issue, this Court may, on the basis of the record now before it, appropriately uphold the action of the local board in denying Ehlert's post-induction-notice claim. There is not here the question which prompted a remand in *Gearey*—"whether the Board * * * refused to *consider* [the] claim simply because of the late date at which it was raised" (*United States* v. *Gearey,* 379 F. 2d at 919—*Gearey II;* see also 368 F. 2d at 150–151). That issue could not be resolved in *Gearey I* because nothing said by Gearey's local board indicated that his file had been considered and, since he had stated a *prima facie* claim (*supra* n. 31), the court could find nothing in his papers suggesting a basis in fact for the board's refusal to re-

[31] It is immaterial that, as petitioner urges, he was not accorded the "courtesy" interview which Gearey received (Pet. Br. 25–26). Gearey had stated a *prima facie* claim; it took a personal appearance for the board to determine that his claim was not "genuine." Since petitioner did not state a *prima facie* claim, the question whether it was really his stated beliefs which motivated him was not put in issue and there was therefore no occasion to interrogate him personally.

open.[32] Here, in contrast, Ehlert's board wrote him a letter (A. 61) informing him specifically that it had "reconsidered [his] classification" on the basis of "the information submitted on" his Form 150. Moreover, as we have shown, there was here no *prima facie* showing of conscientious objection, and there was a basis for concluding that petitioner's beliefs, such as they were, had not in fact crystallized only after the notice was mailed. Had that been the situation presented in *Gearey I*, there would have been no occasion for a remand and *Gearey II*. Cf. *United States* v. *Broyles*, 423 F. 2d 1299, 1302–1304 (C.A. 4). On such a record, the board is thus entitled to have its refusal to reopen upheld by this Court. See 422 F. 2d at 336–337 (Ely, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

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[32] Thus, the district court was ordered to conduct a hearing to determine whether the board members concluded, on the basis of their courtesy interview with the registrant, that Gearey was not sincere in his beliefs. After such a hearing, the conviction was upheld when *Gearey II* upheld the trial court's determination that the local board had so found.

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